In The

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MICHAEL RODAK, JR., CLERK

Supreme Court of the United States

October Term, 1972

No. 72-1248

MULTARI EQUIPMENT CORPORATION and SALVATORE MULTARI,

Petitioners,

-against-

THE PEOPLE OF THE STATE OF NEW YORK,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF NEW YORK, APPELLATE DIVISION, SECOND DEPARTMENT

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In The

Supreme Court of the United States

October Term, 1972

No. 72-

MULTARI EQUIPMENT CORPORATION and SALVATORE MULTARI,

Petitioners,

vs.

THE PEOPLE OF THE STATE OF NEW YORK,

Respondent.

Petition for a Writ of Certiorari to the Supreme Court of the State of New York, Appellate Division, Second Department

Statement

Petitioners, MULTARI EQUIPMENT CORPORATION and SALVATORE MULTARI, jointly and severally, petition this Court to grant a Writ of Certiorari to review the order of the New York Supreme Court, Appellate Division, Second Department, dated November 6, 1972, which reversed a trial order of dismissal of the Westchester County Court and reinstated the indictment with a direction that it again proceed to trial.

An application for leave to appeal was made to the Court of Appeals of the State of New York, but the application for leave to appeal was dismissed on the 13th day of December, 1972, by Honorable John F. Scileppi, Associate Judge.

The indictment had charged the petitioners with attempted grand larceny in the second degree; falsifying business records in the first degree, and offering a false instrument for filing in the first degree.

Opinion Below

A memorandum decision of the Appellate Division reversing the dismissal of the charges against the petitioners is reproduced in the appendix hereto.

Jurisdiction

The jurisdiction of this Court is invoked under 28 U.S.C. Section 1257(3).

Judge John F. Scileppi of the Court of Appeals of the State of New York denied an application for leave to appeal to the Court of Appeals on the 13th of December, 1972.

Questions Presented

1. Whether petitioners were placed in double jeopardy by the order of the Appellate Division of the State of New York reinstating the indictment following its dismissal by the County Court

Judge after jeopardy had attached? (Fifth and Fourteenth Amendments, United States Constitution)

2. Whether the due process clause of the Fifth and Fourteenth Amendments are violated by compelling a defendant to stand trial where there is admittedly insufficient evidence to establish criminality as a matter of law?

3. Whether the rules of evidence as indicated by the reversal of the Appellate Division conform to the standards required by the Federal Constitution? (Chambers v. Mississippi, 71-5908, decided February 21, 1973, ___ U.S. ___)

4. Whether petitioners were deprived of the right of confrontation by the ruling of the Appellate Division that they were not entitled to determine what was actually said at a crucial meeting upon which the indictment was predicated?

Constitutional and Statutory Provisions Involved

The Fifth, Sixth and Fourteenth Amendments of the United States Constitution are involved, as well as Section 290.10 of the Criminal Procedure Law of the State of New York.

Statement of the Case

The issues herein are relatively simple since they involve the question of whether or not the Trial Court was correct in granting the trial order of dismissal pursuant to Section 290.10 of the

Criminal Procedure Law. As ancillary questions, the respondent is asking this Court to rule that the determination of the Trial Court that certain evidence was inadmissible was erroneous as a matter of law. These questions sought to elicit from the main witness of the prosecution, Harold Good, an employee of the New York State Commission of Investigation, certain conversations among employees of that Commission and the co-petitioner, SALVATORE MULTARI, on two occasions, June 5th and June 11th, 1969, when no hearing reporter was present and no transcript or memoranda of the questions and answers existed.

Good was completely unable to state what questions were propounded or by whom, and could not specifically recall what answers were given to which particular questions. The prosecutor at the trial was of the erroneous opinion that the questions by other employees propounded to the petitioner, Salvatore Multari, were inadmissible "hearsay" and that therefore only the best recollection of the answers were admissible. The Trial Court of course rejected that contention completely.

In addition, Good admitted that he did not recall whether or not the answers that he had some general recollection of, were in response to relevant questions because he frankly could not remember the questions or who asked them.

On another occasion, June 27, 1969, when a hearing reporter was present, and questions and answers were propounded to the petitioner, SAL-

VATORE MULTARI, the prosecution advised the Court that those questions and answers which were recorded were of no use to the case. Only those questions and answers which Mr. Good vaguely recalled, when no reporter was present, would be helpful, he said.

The Trial Court correctly rejected this sort of testimony since it is elementary that testimony consists of a question and an answer and neither the question nor the answer standing alone is testimony.

In its brief, the respondent argues that the statements allegedly made by petitioner, SALVATORE MULTARI, were in the nature of confessions or admissions. Here too, however, the respondent is incorrect since there is no evidence in the record as to what questions were asked so it is impossible to determine whether or not the answers, vaguely recalled by Mr. Good, were responsive to relevant questions.

It is not enough, however, that the prosecution wanted this rather vague testimony by Mr. Good to be received in evidence, but, in addition, sought to predicate the testimony of an accountant upon the questions and answers allegedly made by the co-petitioner SALVATORE MULTARI in order to infer possible criminality.

At the trial, the petitioner was unable to determine what questions were asked or answered because Mr. Good just did not recall. The Court therefore properly ruled that the testimony of Mr.

Good would have to be limited to the rules of evidence which, of course, require with some degree of specificity, that a witness recall what question was asked and what answer was made to that question. A general, rambling, narrative type of amorphous recollection cannot be a substitute for testimony at a trial. This is fortified by the fact that when the witness (co-petitioner SALVATORE MULTARI) appeared on June 27, 1969 before the Commission and a transcript was made of his testimony at that time, there was absolutely nothing of an incriminating nature revealed. It is therefore hard to believe that the offer of proof in the Court below as to what Mr. Good would try to recall, was submitted in good faith.

A few examples of Mr. Good's rather clumsy attempts to recall what was said, should suffice to demonstrate that the Trial Court was well justified in granting the motion since THE PEOPLE admitted they had no other evidence against the petitioners (158):

"Direct Examination (con'td) by Mr. Rende:

Q. Mr. Good, during the course of his appearance in the temporary Commission headquarters, was there any list of questions which Mr. Multari was to be asked before he appeared there? A. No, sir, there was not.

Q. And at this meeting was any specific member of the Commission entrusted with the duty of asking Mr. Multari various questions? A. No, sir.

Q. And besides Mr. Sohn, Mr. Alleyene, I think you mentioned, and perhaps Mr. Cutler, were there any other members of the Commission who were asking any questions? A. We were the only ones present, so we were the only ones who were asking the questions, Mr. Rende.

Q. Now, sir, do you recall specifically who it was that asked which question of Mr. Multari? A. No, sir, I do not.

Q. Do you recall yourself specifically asking Mr. Multari any particular question? A. Not any particular question, Mr. Rende.

Q. Well, do you recall asking him personally any questions? A. I did ask him questions, yes.

Q. Do you recall which questions or what area you questioned Mr. Multari about? A. No, sir, I have no recollection and no record of it. . . ."

The witness Good continued (159, 160):

"Q. Mr. Good, I am going to ask you to tell me and this Court if you specifically remember any particular question that you recall asking Mr. Multari, not necessarily word for word but in substance? A. That I personally asked him?

Q. Yes. A. I have no recollection of any particular questions that I asked him, Mr. Rende. . . .

Q. Do you have any record that might serve to refresh your memory? A. As to the specific questions and answers?

Q. As to what the statements given by Mr. Multari were and who asked them, who asked the questions? A. No, there is no record. There were no minutes taken, Mr. Rende, and there was no indication as to who proposed the questions throughout the interview we had. All we did was made a record of the results of our interview."

The colloquy with the Court indicated that the Court was not foreclosing the District Attorney from presenting a case if there was one to present but rather was requiring him to be more than precise in adhering to the rules of evidence. Thus, the following took place during the colloquy (161):

"Mr. Rende: I think the record ought to reflect, Your Honor, that we have had discussions, that is, the People and the defendant as well as the Court informally in chambers since the Court recessed this morning, and the issue which we faced when we recessed this morning was whether or not Mr. Good's recitation of Mr. Multari's statements before a meeting held at the temporary headquarters of the State Investigation Commission in June, whether Mr. Good's recitation of Mr. Multari's answers would be admissible since Mr. Good would not specifically recall who specifically asked which question that brought a particular answer from Mr. Multari.

The Court: I think it went a little farther than that, Mr. Rende.

Mr. Rende: Fine.

The Court: In the first instance, Mr. Good was testifying with respect to an appearance before himself, an accountant and two other representatives of the State Investigation Commission. It was his testimony there had been a conversation and that not only couldn't he recall which particular individuals asked which questions, it was indicated he couldn't recall the questions asked. We had a conference at the side of the bench that was the substance of the conference, that he also couldn't identify the questions; isn't that correct?

Mr. Rende: Yes."

At another juncture it was obvious that the District Attorney completely misunderstood the hearsay rule since he argued to the Court that questions asked of the defendant by any individual other than Mr. Good himself would be hearsay. The Court, of course, summarily rejected this argument (174, 175):

"Mr. Rende: This is my final point. Quite to the contrary of what I believe is the position of the Court, to require Mr. Good to recite what questions were asked by other people other than himself would clearly violate the hearsay rule. In that situation Mr. Good is being asked to relate what Mr. X, Mr. Y or Mr. Z asked the defendant. That is a clear violation of the rule.

The Court: I thought there was a clear

exception to the rule that conversations between the defendant and someone else overheard by a third party in the clear presence of both parties could be testified to by the third party. I thought that was one of the exceptions.

Mr. Lanna: As I understand it, yes, sir.

The Court: That's the way I understand it. That's a time when a witness can testify as to what he heard when he has heard both ends of the conversation in his presence.

Mr. Rende: Then I would again request some position by the Court on why Mr. Good's testimony couldn't be brought forward.

The Court: Mr. Good can testify with respect to any question he asked the defendant and any answers the defendant gave him. The Court ruled that before and before you commenced your last series of questions of Mr. Good on the witness stand, the Court had directed you to follow that line of questioning and you didn't do so, and I think you indicated that witness wasn't in a position to do it. The witness himself said it.

Mr. Lanna: My recollection is that he said he couldn't state what questions he asked.

The Court: That's my recollection."

In essence the ruling of the Court is contained in the colloquy at page 174:

"The Court: Well, the Court is not excluding this proof because of the contents of the proof, because as the proof would have evolved had it been admitted, would have depended upon ruling time and again during the course of the testimony. The Court has rejected the proof and, therefore, rejects the offer of proof on the grounds that this witness cannot testify with any clear recollection as to what exactly transpired at the hearings, at the meetings of June 5th and June 11th, in that he cannot testify with respect to conversations made in his presence, taken place in his presence with the defendant, because he can neither testify as to questions asked and responses given, nor can he identify the particular question and the particular response given to a particular question. The Court is concerned here with the witness being confronted by four inquisitors, and the Court is not using the word inquisitors to characterize representatives of the SIC, but to point out there were four people present, all of whom according to the witness were asking questions, and there is no clarity that the Court can foresee in the testimony as the Court has said before and is now being redundant is saying to identify the questioner nor the question. And it is conceivable that if four people are asking questions, that an answer could be given to a question not at the time being asked by one of the questioners, and, therefore, put the witness at a grave disadvantage in trying to recall the

context in which the questions were asked and the answers were given."

Lawrence Saltz, who was employed as a senior accountant in the Department of Public Works, had approved payment of the petitioners' bills and transmitted this approval to the Commissioner of Public Works for his approval. The claims which were submitted on March 14, 1969, and approved on June 18, 1969, were not paid (94, 96, 99).

It is thus clear that there was no evidence of criminality introduced during the trial.

Argument

Point I.

THE REVERSAL BY THE APPELLATE DIVISION ON THE LAW AND ON THE FACTS NECESSARILY PLACED THE PETITIONERS IN DOUBLE JEOPARDY IN VIOLATION OF THE FIFTH AND FOURTEENTH AMENDMENTS OF THE UNITED STATES CONSTITUTION, SINCE THE NISI PRIUS COURT'S TRIAL ORDER OF DISMISSAL WAS NECESSARILY ON THE LAW AND NOT ON THE FACTS. THE APPELLATE DIVISION, BY REVERSING ON THE FACTS, IMPLIEDLY ADOPTED THE PROSECUTOR'S POINT OF VIEW THAT STATEMENTS UTTERED IN THE PRESENCE OF A DEFENDANT ARE INADMISSIBLE IN EVIDENCE. MOREOVER, THE APPELLATE DIVISION'S RULING PRECLUDES EFFECTIVE CROSS-EXAMINATION IN VIOLATION OF THE SIXTH AMENDMENT.

At the trial the petitioners were placed upon the horns of a dilemma since they were unable to determine what was said during an important meeting at which petitioner SALVATORE MULTARI was present.

The District Attorney admitted that the witness Harold Good, an employee of the New York State Commission of Investigation, was unable to recall what was said at this particular meeting, nor could he remember who said what to whom. Yet, he claimed to have some vague general recollection of a conclusory nature about which he wished to testify. The Trial Court quite properly refused to permit such evidence since it would be impossible to effectively cross-examine the witness. Additionally, the defense would be incapable of subpoenaing witnesses who may have been present but whose conversations were not recalled by Good (158-161).* (Chambers v. Mississippi, 71-5908, decided February 21, 1973, ___ U.S. ___).

The witness, Good, admitted that there had been no record nor transcript of the proceedings about which he was testifying which allegedly occurred during an investigation by the staff of the State Investigation Commission.

It is elementary that since the question and answer could not be recalled, the vague recollections were not evidence. Only a question followed by an answer where otherwise properly relevant and material, may be received in evidence.

* Numerals in parenthesis refer to the appendix in the Appellate Division of the Supreme Court, unless otherwise indicated.

A question alone and an answer alone are not evidence. (Wiggins v. Burkham, 10 Wall. 129, 19 L. Ed. 884; Lockwood v. Thorne, 18 N.Y. 285)

In Leach & Co. v. Pierson, 275 U.S. 120, 128, Justice Holmes declared in substance that evidence cannot be created by a question or statement in and of itself. It is the answer and the statement or question that constitutes the evidence.

The Trial Court in this case determined to grant a trial order of dismissal pursuant to 290.10 of the Criminal Procedure Law which declares, in part, that a trial judge may dismiss an indictment or any count thereof upon the ground that "the trial evidence is not legally sufficient to establish the offense charged therein or any lesser included offense." This Court has held that the Government or prosecution may not secure a new trial by means of an appeal even though an acquittal or dismissal may appear to be erroneous. (Green v. United States, 355 U.S. 184, 2 L.Ed.2d 199, 204, 61 A.L.R.2d 1119. See also, Benton v. Maryland, 395 U.S. 784, and Ashe v. Swenson, 397 U.S. 436.)

At the very least, the prosecution would seem to be collaterally estopped from obtaining a reversal on the facts in this case and proceeding to trial again. (Harris v. Washington, 404 U.S. 55)

It is submitted, therefore, that based upon the evidence, there was no doubt whatsoever that the prosecution had no basis to proceed and that the

Trial Court was quite correct in dismissing the charges. The reversal by the Appellate Division necessarily indicates that the trial may proceed without affording the petitioners an opportunity to confront witnesses or to even know what the witnesses said.

Point II.

THE BASIC CRIMINAL LAW, AS WELL AS THE LAW OF THE STATE OF NEW YORK, REQUIRE THAT A "CORPUS DELECTI" FOR ANY CRIME BE ESTABLISHED. IN THE CASE AT BAR HOWEVER, THE EVIDENCE TOTALLY FAILS TO ESTABLISH THAT THE PROSECUTION PROVED THE EXISTENCE OF ANY CORPUS DELECTI.

In Chambers v. Mississippi, supra, this Court very recently established that it would not be foreclosed from considering evidentiary points if the application of a state rule of evidence deprived a litigant, in a state prosecution, of due process. This, however, is exactly what happened in the case at bar.

Section 60.50 of the Criminal Procedure Law declares that a person may not be convicted of any offense solely upon evidence of an admission made by him "without additional proof that the offense charged has been committed." People v. Roach, 215 N.Y. 592; People v. Taleisnik, 225 N.Y. 489; People v. Ulisano, 18 App. Div.2d 432; People v. Cassese, 281 App. Div. 890; and, People v. Edwards, 25 N.Y. Supp. 480.

In other words, the prosecution never had a corpus delecti of a crime. Supposedly, without the alleged conversations between certain persons and SALVATORE MULTARI, none of which were recorded, there would be no inkling of the possibility of any criminality.

Saltz, the accountant for the Public Works Commissioner, had approved payment so, apparently, everything was prima facie in order.

Good's testimony would still not have supplied evidence of criminality but the prosecution hoped that if Good were permitted to testify, that they then might produce an accountant who then might infer the possibility that services rendered by respondents were in excess of the amount of actual work performed. Everything, however; would depend upon the alleged admissions of SALVATORE MULTARI and not upon any independent evidence at all. Thus, under no circumstances was there a corpus delecti of this crime.

Conclusion

The Petition for Certiorari should be granted and the judgment of conviction reversed.

Respectfully submitted,

IRVING ANOLIK
Attorney for Petitioners

APPENDIX

Order and Decision of the Appellate Division

On the 8th day of November, 1972, the Appellate Division of the Supreme Court, Second Department, unanimously reversed the order of the Trial Court which had granted a trial order of dismissal, and the Appellate Division reinstated the indictment with a direction to retry the case. The Decision (per curiam Decision) of the Court is as follows:

> "People &c., ap, v. Multari Equipment Corp. & Salvatore Multari, res— Appeal by the People from a trial order of dismissal, made Feb. 29, 1972, by the County Court, Westchester County, pursuant to CPL 290. 10, at the close of the People's case.
>
> Trial order of dismissal reversed, on the law and the facts, and new trial ordered.
>
> Defendants were indicted for grand larceny in the second degree, falsifying business records in the first degree and offering a false instrument for filing in the first degree. The basis for the charges was that defendants, retained by the City of Yonkers to aid it in snow removal operations in February of 1969, claimed payment for employing personnel to engage in such operations for a total of 3,308 hours, whereas the hours actually worked by such personnel were much less.
>
> At the trial, Good, an investigator for the State Investigation Commission, offered to testify that at an interview before him

and three other employees of the commission, defendant Salvatore Multari made certain possibly incriminating statements as to the equipment used and personnel employed by him with respect to such operations. However, the trial court refused to admit such proposed testimony since Good had admitted that he could not remember the exact questions that were asked of Multari and by whom they were asked, and the particular responses given thereto. No stenographic minutes were taken of the interview. In our opinion, the trial court erred in barring such testimony.

Testimony by a witness of an admission by a defendant should not be excluded because the witness does not remember the whole conversation or recall the exact words used (see 22A C.J.S., Criminal Law, sections 730, 735). Verbal precision in proving oral statements is not required. The substance or effect is sufficient (State v. Davis, 237 La. 577; Edwards v. State, 198 Md. 132; cf. McRorie v. Monroe, 203 N.Y. 426; People v. Colon, 281 App. Div. 354). That Good did not remember, inter alia, the questions asked, who propounded them, and the answers given, but allegedly remembered the substance of Salvatore Multari's answers, goes to the weight of the evidence, not to its admissibility."

Concurring: Samuel Rabin, P.J.; Latham, Shapiro, Christ and Brennan, JJ.

Decision Denying Leave to Appeal

STATE OF NEW YORK
COURT OF APPEALS

John F. Scileppi
Judge
(SEAL)

125-01 Queens Boulevard
Kew Gardens 15, New York

December 13, 1972

Irving Anolik, Esq.
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Re: People v. Multari Equip. Corp.

Dear Mr. Anolik:

This is to advise you that your application for a certificate permitting an appeal to the Court of Appeals from an order of the Appellate Division, Second Department, dated November 6, 1972, which unanimously reversed a trial order of dismissal of the Westchester County Court, is dismissed.

The Appellate Division order recites that the decision of that court was on the law and the facts. We are, therefore, without jurisdiction to consider an appeal (Criminal Procedure Law, §450.90, subd. 2).

Very truly yours,

s/ John F. Scileppi

JFS:mek
cc: Clerk of Court of Appeals
Westchester County District Attorney